APPENDIX "A"

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6857

COMMONWEALTH COATINGS CORPORATION,

Plaintiff-Appellant,

—v.—

CONTINENTAL CASUALTY COMPANY, *et al.,*

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Before:

ALDRICH, *Chief Judge,*
McENTEE and COFFIN, *Circuit Judges.*

Emanuel Harris, with whom *Carlos A. Romero Barcelo, Max E. Greenberg,* and *Segurola, Romero & Toledo* were on brief, for appellant.

Overton A. Currie, with whom *Federico Ramirez Ros, Edward H. Wasson, Jr., Ramirez, Segal & Latimer* and *Smith, Currie & Hancock* were on brief, for appellees.

September 27, 1967

PER CURIAM. This is an appeal by the losing party to an arbitration award in which he invokes the provisions of 9 U.S.C. § 10 (1964). The sole ground of the appeal is the failure of one Capacete, the impartial arbitrator selected by the other two, and of appellee Samford, the successful party, to disclose the past relationship between Capacete and Samford. Briefly, this relationship was as follows. Capacete was a majority owner of Foundation Engineering Company of Puerto Rico, a firm of very broad activities in the community and which, over a period of years, performed drilling operations for foundation investigations and conducted laboratory testing of construction materials for Samford. These services, performed by the firm under Capacete's general supervision, and to some extent requiring his direct intervention, were in several instances rendered with regard to the projects involved in the arbitration. Capacete also did some work for the architects on the projects. The payments received were a very small part of Capacete's income for the years involved, and none of the services related to matters in question in the arbitration, or was rendered during the proceedings. It is appellee's position that there was no duty to disclose, and that if appellant desired knowledge as to the existence of such past relationships it was incumbent upon him to inquire, citing *Ilios Shipping & Trading Corp.* v. *American Anthracite & Bituminous Coal Corp.*, D.C.N.Y., 1957, 148 F. Supp. 698, *aff'd*, 2 Cir., 245 F.2d 873.

In our opinion there is a difficult line between what should, in good faith, be volunteered, and what may be left for inquiry. We may agree with appellant that where there is a disturbingly close relationship the very failure to make disclosure could be evidence of partiality, and we think it would have been far better if there had been disclosure

here. However, we cannot say that the relationship was sufficiently close to establish "evident partiality" within the statute as a matter of law. *Cf. Milliken Woolens, Inc.* v. *Weber Knit Sportswear, Inc.*, 202 N.Y.S.2d 431, *aff'd*, 9 N.Y.2d 875, 175 N.E.2d 826. As to appellant's companion contention, the court was well warranted in finding that there was no prejudice or bias in fact manifested in the course of the proceedings. Indeed, there was considerable evidence which negatived it.

Affirmed.

APPENDIX "B"

Opinion of District Court

MEMORANDUM

[SAME TITLES]

These are actions under Sections 270(a) and 270(b) of Title 40 U.S.C.A. under a payment bond delivered to the United States by defendants in connection with a subcontract for a painting job.

By Order of this Court dated March 12, 1963, the actions were stayed pending the decision and award of a Board of Arbitration. The arbitrators rendered their unanimous Final Award and Determination on 12 November 1963. By the said award the principal contractor, A. C. Samford Overseas, Inc. was awarded the sum of $15,872.35 recoverable from plaintiff, Commonwealth Coatings Corporation. Plaintiff has challenged the Award, and seeks an order from the Court vacating it, on the following grounds:

1. Lack of power to grant the award because of the restraining order of the Referee in Bankruptcy of November 8, 1963, in The Foundation Company, et al., bankruptcy proceedings in the USDC, SDNY, Case No. 63B903.

2. A contention that reversible error was committed by the arbitrators in admitting certain exhibits of Samford and in not extending the arbitration hearings.

3. Alleged partiality, bias or fraud of the arbitrators.

4. Alleged failure of the arbitrators to render the award within 30 days of the close of the hearings.

5. A contention that the award was void because the arbitrators held hearings on Sundays and holidays.

Exception Nos. 1, and 4 above were dealt with at the hearing of February 14, 1966, and the Court indicated, (p. 16, Tr.) that it was not impressed by them. The opinion of the Court has not changed, and they are overruled.

With respect to No. 3, alleged partiality, bias or fraud of one of the arbitrators, counsel for plaintiff disclaimed any imputation of bias, partiality, or fraud on the part of the arbitrator involved. He seeks to overthrow the award on the ground that *Samford* should have informed plaintiff that the engineering firm with which the arbitrator involved[1] was connected had in the past done work for Samford. In view of the fact that, not only has plaintiff failed to offer any evidence showing "evident partiality" in said arbitrator (9 U.S.C. Sec. 10(b)), it also has expressly disclaimed any such imputation, this objection to the award must be, and is hereby overruled. See: *Ilios Shipping and Trading Corp., S.A., Petitioner, and American Anthracite & Bituminous Coal Corp., Respondent,* 148 F. Supp. 698, and cases cited therein.

In connection with the claim, objection 2 above, that the arbitrators erred in admitting certain exhibits, suffice it to say that Commonwealth Coatings Corp. made no objection to their admission by the arbitrators, nor was any request for an extension of time made.

Objection 5, the holding of hearings on Holidays and Sundays, is too frivolous to merit discussion, and is overruled.

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[1] Who had been selected by the two arbitrators designated by the parties.

In closing, I wish to state that the record shows that the arbitrators conducted fair, impartial hearings; that they reached a proper determination of the issues before them, and that plaintiff's objections represent a "situation where the losing party to an arbitration is now clutching at straws in an attempt to avoid the results of the arbitration to which it became a party." (*Ilios Shipping and Trading Corp., S.A., Petitioner, and American Anthracite & Bituminous Coal Corp., Respondent,* supra).

Plaintiff's motion to vacate the award of the Board of Arbitration is hereby Denied, the Award is confirmed, and Judgment will be entered in favor of defendants, for the amount determined by the arbitrators.

San Juan, Puerto Rico, September 30, 1966.

(signed) CLEMENTE RUIZ-NAZARIO
Clemente Ruiz-Nazaria
Chief United States District Judge

FILED & ENTERED
Sep 30 1966

CLERK, U.S. DISTRICT COURT
SAN JUAN, PUERTO RICO

APPENDIX "C"

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6857.

COMMONWEALTH COATINGS CORPORATION,

Plaintiff-Appellant,

—v.—

CONTINENTAL CASUALTY COMPANY *et al.*,

Defendants-Appellees.

JUDGMENT

September 27, 1967.

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

ROGER A. STINCHFIELD
Clerk.

By: /s/ DANA H. GALLUP
Chief Deputy Clerk.

APPENDIX "D"

Statute Involved

FEDERAL ARBITRATION ACT

Title 9 U. S. Code

§2. *Validity, irrevocability, and enforcement of agreements to arbitrate.*—A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such a contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§3. *Stay of proceedings where issue therein referable to arbitration.*—If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§9. *Award of arbitrators—Confirmation—Jurisdictional —Procedure.*—If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.